



**Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Sign Removal Order Issued by
the Department of Transportation to The Lamar
Company, LLC for a Sign Located Along I-39 in
Rock County (OASIS Number 14617)

Case No: DOT-16-0020

FINAL DECISION

On June 22, 2016, the Department of Transportation (Department) issued a sign removal order to The Lamar Company, LLC (Lamar) and Wixom Family Trust for a sign located along I-39, 2825 feet south of CTH "M" underpass in Rock County (OASIS Number 14617). By letter dated July 18, 2016, Attorneys Thomas S. Hornig and Kraig A. Byron, on behalf of Lamar, requested a hearing pursuant to Wis. Stat. § 84.30(18) to review the Department's sign removal order. Pursuant to due notice, the Division of Hearings and Appeals (Division) held a hearing on January 17, 2018, in Madison, Wisconsin. Mark F. Kaiser, Administrative Law Judge, presided. The parties filed post-hearing briefs. The Department filed its initial brief on May 14, 2018. Lamar filed a response brief on June 15, 2018. The Department filed a reply brief on June 28, 2018.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

The Lamar Company, LLC (Lamar), by

Attorney Kraig A. Byron and
Attorney Thomas S. Horning
von Briesen & Roper, S.C.
10 East Doty Street, Suite 900
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Wisconsin Department of Transportation (Department), by

Attorney Paul E. Nilsen
Department of Transportation
P.O. Box 7910
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Issues to be Decided

Whether the allegations set forth in the Department's sign removal order are true and, if the allegations are true, whether they constitute a basis for the loss of the legal, nonconforming status for the subject sign.

The Administrative Law Judge issued a Proposed Decision in this matter on April 17, 2019. On May 2, 2019, Lamar filed comments on the Proposed Decision. Lamar supported the ultimate decision but objected to the conclusions related to the Department's authority and the Division's jurisdiction in this matter. In its objections, Lamar did not raise any new arguments challenging the Department's authority to issue the sign removal order or the Division's jurisdiction to review the order at issue in this matter. For the reasons set forth in the Proposed Decision, Lamar's arguments that the Department does not have the authority to issue a sign removal order for the subject sign and the Division does not have jurisdiction to review the order are not persuasive.

Also, on May 2, 2019, the Department filed objections to the Proposed Decision and a request for reconsideration. Specifically, the Department objects to the finding that the use of Scotch Lite lettering constitutes a form of illumination for outdoor advertising signs and requests that the finding be reconsidered. Whether the use of Scotch Lite lettering on outdoor advertising sign is a form of illumination is a close question. Electrical lighting is certainly brighter than Scotch Lite lettering and is continuous, as opposed to intermittent, unlike Scotch Lite lettering. However, the fact that the Department classified Scotch Lite lettering as a form of illumination in its sign inventory supports the finding in the Proposed Decision that it is. Additionally, the reference to "illumination" in the newly created Wis. Stat. § 84.30(5)(br)1(f), as opposed to referring to electrical lighting, suggests that illumination for purposes of the sign control law is broader than just electrical lighting. The Department's objections to the finding that the use of Scotch Lite lettering is a form of illumination are not persuasive and the request for reconsideration is denied. The Proposed Decision is adopted as the final decision in this matter.

Findings of Fact

The Administrator finds:

1. The Lamar Company, LLC, (Lamar) owns and controls an outdoor advertising sign that was erected in the adjacent area along the eastbound lanes of Interstate Highway-39 (I-39), 2825 feet south of County Trunk Highway "M" in Rock County. The sign is identified as OASIS Number 14617 in the database of the Department of Transportation (Department). I-39 is federal-aid highway.

2. The property on which the sign is located is currently owned by the Wixom Family Trust. According to Department records, the Department issued sign permit no. 53-90-20 to Osgood, Inc., for the erection and maintenance of the sign. The sign was subsequently acquired by Vivid, Inc. (Vivid). The sign appears in a Department sign inventory document dated 1966.

3. The current provisions of Wis. Stat. § 84.30 (the sign control law) became effective on March 18, 1972. After that date, outdoor advertising signs visible from the main-traveled way of a federal-aid highway can only be erected in what is defined as "business areas" along those highways. The zoning for the land on which the sign is located does not qualify as a "business area" for purposes of Wis. Stat. § 84.30. The site on which the sign is located is not eligible for a sign permit. However, because the sign was in existence on March 18, 1972, it was allowed to be maintained as a nonconforming sign.

4. In a Department sign inspection report dated March 14, 1974, the sign at the time it became a nonconforming sign is described as a completely wooden structure, with a single sign face twenty feet wide by eight feet high (exh. 2, Bates no. 0010). According to Department records, the sign had “illumination.” The illumination is identified as “Scotch Lite.” “Scotch Lite” is reflective material applied to outdoor advertising signs to make the sign visible in very low light situations when headlights of passing motor vehicles strike the sign. (testimony of Brad Yarmark, tr. 203:8-15) Lamar acquired the sign from Vivid in 1999 (testimony of Brad Yarmark, tr. 198:12-14).

5. Dennis Drier (Drier), a now retired Department sign permit coordinator for the region including Rock County, inspected the sign on May 11, 2016. Based on his inspection and a review of photographs of the sign in the Department records, Drier noted several changes to the sign since it became nonconforming. The changes are that an electrical lighting fixture had been added at the bottom of the sign face, a couple of electrical boxes were added to the support posts for the sign, and two three inch by three inch angle irons were attached to the center support posts of the sign structure. (testimony of Drier, tr. 44:1-9)

6. On June 22, 2016, the Department issued a sign removal order for the sign. The sign removal order alleged that the sign lost its nonconforming status because lighting had been added to the sign and the sign had changed from a completely wood structure to one with a wood and metal frame. (exh. 1)

Discussion

The sign was in existence on March 18, 1972, and can be maintained as a nonconforming sign. Wis. Admin Code § Trans 201.10(2) sets forth the requirements for maintaining a nonconforming sign. Relevant to the instant matter is Wis. Admin Code § Trans 201.10(2)(e), which provides:

(2) In order to lawfully maintain and continue a nonconforming sign, or a grandfathered sign under s. 84.30 (3)(d), Stats., the following conditions apply:

(e) The sign must remain substantially the same as it was on the effective date of the state law, and may not be enlarged. Reasonable repair and maintenance of the sign, including a change of advertising message, is not a change which would terminate nonconforming rights. Customary maintenance ceases and a substantial change occurs if repairs or maintenance, excluding message changes, on a sign exceeds 50% of the replacement costs of the sign.

In its sign removal order, the Department alleges that the sign has not remained substantially the same because sometime after 1974 electrical lighting and some metal components were added to the structure.

The electrical lighting replaced Scotch Lite lettering which had previously been used on the sign. Scotch Lite lettering is a reflective material that makes the message on the sign face visible to motorists in the dark when the sign face is hit by motor vehicle headlights. The metal

components added to the sign structure are angle iron pieces used to attach conduit to the sign structure for the electric lighting. That these changes were made to the sign is not disputed. The issue in this matter is whether these changes mean the sign has not remained substantially the same in violation of Wis. Admin Code § Trans 201.10(2)(e).

The Department is required by the Federal Highway Administration (FHA) to impose conditions on the maintenance of nonconforming signs. Wis. Stat. § 84.30 and Wis. Admin. Code chap. Trans 201 were created to comply with federal statutes and administrative rules that apply to controlled highways (see Wis. Stat. §§ (1) and (16) and Wis. Admin. Code § Trans 201.01). Accordingly, federal regulations and guidance are critical sources to consider in interpreting Wis. Stat. § 84.30 and Wis. Admin. Code chap. Trans 201. In a memorandum dated September 1, 1995, the FHA stated:

We would consider that the addition of lighting, whether as a part of the structure or from a remote location if done for the purpose of lighting the sign would constitute a substantial change which should cause the sign to lose its nonconforming rights under State law. Generally, the addition of lighting results in a nonconforming use confined to daylight hours to be substantially extended, i.e. to a 24 hour period, which constitutes a substantial change.

Similarly, in a memorandum dated February 1, 1983, the Federal Highway Administration stated:

Unilluminated signs could be seen only during daylight hours. The addition of illumination would make them visible 24 hours a day, further increasing the amount of intrusion the signs have on the surrounding area. Therefore, the addition of illumination would be a substantial change to the sign.

exh. 3

At the time the sign removal order at issue in this matter was issued, the phrase “[t]he sign must remain substantially the same” in Wis. Admin Code § Trans 201.10(2)(e) was not defined. Since then, Wis. Stat. § 84.30 has been amended. The amendment includes definitions for the phrases “Substantial change” and “Substantially the same.” 2017 Wisconsin Act 320 created Wis. Stat. § 84.30(5)(br).

Wis. Stat. §§ 84.30(5)(br)1(f) and (g) provide:

f. “Substantial change,” with respect to a nonconforming sign, includes increasing the number of upright supports; changing the physical location; increasing the square footage or area of the sign face; adding changeable message capability; or adding illumination, either attached or unattached, to a sign that was previously not illuminated. “Substantial change” does not include customary maintenance.

g. “Substantially the same,” with respect to a nonconforming sign, means that no substantial change has been made to the sign since it became nonconforming.

The effective date for 2017 Wisconsin Act 320 was April 17, 2018, which is after the sign removal order at issue in this matter was issued. However, there is no indication that the

legislative intent in creating Wis. Stat. § 84.30(5)(br) was to amend Wis. Stat. § 84.30, but rather for clarification and to provide some definition for previously undefined terms and phrases used in Wis. Stat. § 84.30 and Wis. Admin Code chap. Trans 201. The creation of Wis. Stat. §§ 84.30(5)(br)1(f) and (g) reinforces that the federal guidance on the addition of illumination to a nonconforming sign is the interpretation intended for the phrase “[t]he sign must remain substantially the same” in Wis. Admin Code § Trans 201.10(2)(e).

Accordingly, adding illumination to a nonconforming sign that was not previously illuminated constitutes a substantial change to the sign. The factual issue in this matter thus boils down to whether the use of Scotch Lite lettering on an outdoor advertising sign is a form of illumination. Scotch Lite lettering is a reflective material that makes the lettering on an outdoor advertising sign visible during hours of darkness when the face of the sign is hit by motor vehicle headlights. “Illuminate” is defined as “to give light to, light up.” (Webster’s New World Dictionary) The use of a reflective material caused the sign to “light up” when struck by headlights. At times the sign was hit by headlights, it was illuminated. The determination that the use of Scotch Lite lettering is a form of illumination is consistent with the Department’s view at the time the sign control law became effective. On the Department’s inventory sheet for the sign dated March 14, 1974, “Yes” is checked by the question of illumination. The words “Scotch Lite” is written on the inventory sheet as the manner of illumination. (exh. 1)¹

The February 1, 1983 FHA memorandum mentions the intrusiveness of an outdoor advertising sign as part of the determination whether a nonconforming sign has remained substantially the same. An illuminated sign is visible continuously in the dark, while one with Scotch Lite lettering will only be visible when struck by headlights. However, the purpose of the Highway Beautification Act, the federal law which prompted the more intrusive than one with reflective lettering, is to, among other purposes, promote the enjoyment of public travel. Wis. Stat. § 84.30(1), sets forth the legislative findings and purpose of Wis. Stat. § 84.30. Wis. Stat. § 84.30(1) states:

To promote the safety, convenience and enjoyment of public travel, to preserve the natural beauty of Wisconsin, to aid in the free flow of interstate commerce, to protect the public investment in highways, and to conform to the expressed intent of congress to control the erection and maintenance of outdoor advertising signs, displays and devices adjacent to the national system of interstate and defense highways, it is hereby declared to be necessary in the public interest to control the erection and maintenance of billboards and other outdoor advertising devices adjacent to said system of interstate and federal-aid primary highways and the Great River Road.

Although an illuminated sign is visible at all times in the darkness, while a sign with reflective lettering is only visible when being struck by headlights, the intrusiveness relevant to the Highway Beautification Act is for motorists passing the sign. That intrusiveness will exist whether the sign is illuminated by Scotch Lite lettering or electric lighting. The FHA

¹ The subject sign appears on a Department outdoor advertising data list dated 1966 (exh. 2, Bates no. 0037). On that list under the column for illumination, the letter N” appears apparently indicating no illumination. However, there is no description of the appearance of sign in the Department’s records in 1966. Accordingly, there is no basis for determining how the classification of no illumination was made. The 1974 inventory sheet is a comprehensive description of the sign completed after an inspection of the sign by a Department employee. It is a more reliable record of the condition of the sign at the time it became nonconforming pursuant to the provisions of Wis. Stat. § 84.30.

memorandum concluded that the addition of illumination to a previously unilluminated sign was a substantial change because it made the sign that had been only visible during daylight hours to one that would be visible 24 hours a day. The use of Scotch Lite lettering increases the hours an outdoor advertising sign is visible to the same extent as electric lighting. For purposes of Wis. Stat. § 84.30, Scotch Lite lettering is a form of illumination and the conversion to electric lighting is merely an upgrade. The other change to the sign after it became nonconforming is the addition of angle irons. The two angle irons were added to support the conduit for the wiring for the electric lighting. The addition of the angle irons may have provided some additional stability to the sign structure, but their purpose is to upgrade the illumination of the sign. The addition of the angle irons is not a substantial change to the sign.

Lamar also renewed an argument that the Department has no authority to issue sign removal orders directed at nonconforming signs erected prior to March 18, 1972, and that the Division has no jurisdiction to review such an order. The basis for Lamar's argument that the Department has no authority to issue sign removal orders directed at nonconforming signs erected prior to March 18, 1972, is that the only express reference to the Department's authority to issue sign removal orders is found at Wis. Stat. § 84.30(11). Wis. Stat. § 84.30(11) applies to signs erected after March 18, 1972. The only statutory reference to nonconforming signs not located in business areas and in existence on March 18, 1972, is found at Wis. Stat. § 84.30(5)(a).² Pursuant to Wis. Stat. § 84.30(5)(a) nonconforming signs that were in existence on the effective date of the sign law were to be removed within five years of the effective date of the sign law, *i.e.* by March 18, 1972.

The regulation of outdoor advertising signs in existence prior to March 18, 1972, that are not permissible under Wis. Stat. § 84.30 (nonconforming signs) is found in Wis. Admin. Code chap. Trans 201. Lamar argues that the Department exceeded its statutory authority in promulgating the portions of Wis. Admin. Code chap. Trans 201 that apply to nonconforming signs. Pursuant to Wis. Stat. § 84.30(14), the Department has authority to "promulgate rules deemed necessary to implement and enforce" the sign law. Wis. Admin. Code chap. Trans 201 has been promulgated under this authority. It is also important to be aware that Wis. Stat. § 84.30 and Wis. Admin. Code chap. Trans 201 were created to comply with federal statutes and administrative rules that apply to controlled highways (see Wis. Stat. §§ 84.30(1) and (16) and Wis. Admin. Code § Trans 201.01).

The Department is required to impose conditions on the maintenance of nonconforming signs. If a sign owner violates those conditions, the sign loses its nonconforming status. Wis. Admin. Code § Trans 201.09 provides that signs that lose their nonconforming status are subject to removal.³ Despite the absence of an express statutory reference to sign removal orders for

² Wis. Stat. § 84.30(5)(a) provides:

Signs outside of business areas which are lawfully in existence on March 18, 1972 but which do not conform to the requirements herein are declared nonconforming and shall be removed by the end of the 5th year from said date.

³ Wis. Admin. Code § Trans 201.09 provides:

Any sign erected after October 1, 1972, without a permit having been granted therefor, and any nonconforming sign which subsequently violates s. 84.30, Stats., or these rules, shall be subject to removal as an illegal sign. Upon removal of an illegal sign, the owner of the sign shall be given 30 days in which to

nonconforming signs that were in existence on March 18, 1972, the Department has authority and a federal mandate to regulate and seek the removal of nonconforming signs that lose their nonconforming status, including those in existence on March 18, 1972. The Department did not exceed its authority in promulgating the administrative rules regulating nonconforming signs in existence on March 18, 1972.

Lamar also contends that the Division does not have subject matter jurisdiction to review the Department's sign removal orders for nonconforming signs that were in existence on March 18, 1972. If the Department has authority to order the removal of a nonconforming sign erected prior to March 18, 1972, there must be an opportunity for a sign owner to have that removal order reviewed. Assuming the above analysis that the Department has the authority to order the removal of a nonconforming sign that was in existence on March 18, 1972, and subsequently is alleged to have subsequently lost its nonconforming status is correct, the question becomes how the Department's action is reviewed.

A narrow reading of the sign law would suggest that the Division does not have subject matter jurisdiction to review sign removal orders for nonconforming signs lawfully in existence on March 18, 1972. The express statutory authority for the Division's subject matter jurisdiction to review sign removal orders issued by the Department is found at Wis. Stat. § 84.30(18). Wis. Stat. § 84.30(18) provides:

Hearings concerning sign removal notices under sub. (11) or the denial or revocation of a sign permit or license shall be conducted before the division of hearings and appeals as are hearings in contested cases under ch. 227. The decision of the division of hearings and appeals is subject to judicial review under ch. 227. Any person requesting a transcript of the proceedings from the division of hearings and appeals shall pay the amount established by the division of hearings and appeals by rule for the transcript.

Wis. Stat. § 84.30(18) lists three situations under which the Division should conduct a hearing. The situations are when the Department issues a sign removal order under Wis. Stat. § 84.30(11), the Department denies an application for a sign permit or license, and the Department revokes a sign permit or license. Wis. Stat. § 84.30(11) provides:

Any sign erected in an adjacent area after March 18, 1972, in violation of this section or the rules promulgated under this section, may be removed by the department upon 60 days' prior notice by registered mail to the owner thereof and to the owner of the land on which said sign is located, unless such sign is brought into conformance within said 60 days. No notice shall be required to be given to the owner of a sign whose name is not stated on the sign or on the structure on which it is displayed, or whose address is not stated thereon or is not on file with the department.

On its face, Wis. Stat. § 84.30(11) only applies to signs erected after March 18, 1972. Therefore, it does not apply to nonconforming signs in existence on March 18, 1972. Despite the absence of an express statutory grant of jurisdiction to the Division to conduct hearings to review sign removal orders directed at nonconforming signs in existence on March 18, 1972, the most reasonable interpretation is that the Division's subject matter jurisdiction to conduct hearings to

salvage the sign upon payment of actual reasonable costs incurred in removing the sign. If not salvaged, the sign may be disposed of as the department deems appropriate.

review Department sign removal orders for this category of signs is implied. There is no apparent reason that the legislature would have excluded one category of signs from the Division's subject matter jurisdiction. An alternative interpretation is that the historical citation to Wis. Stat § 84.30(18) for the Division's subject matter jurisdiction has been in error and the appropriate citation for the Division's subject matter jurisdiction is Wis. Stat. § 227.43(1)(br).

A nonconforming sign lawfully in existence on March 18, 1972 that has lost its nonconforming status is subject to removal. The owner of a nonconforming sign that the Department is seeking to remove is entitled to due process before the sign is removed. Since the effective date of the sign law, that review has been conducted by an administrative agency. The administrative process to review sign removal orders issued by the Department is consistent with the spirit and intent of the law. The process has been reviewed numerous times by various courts and has not been invalidated. There is no basis to abandon that process without demonstrated legislative intent that another forum is the appropriate one to review the Department's actions.

Conclusions of Law

The Administrator concludes:

1. Since the effective date of Wis. Stat. § 84.30, off premise outdoor advertising signs can only be erected in the adjacent areas of federal aid and interstate highways with a permit issued by the Department. A sign permit can only be issued if the site for the proposed sign is a "business area" as that term is defined at Wis. Stat. § 84.30(2)(b). The subject sign is located in the adjacent area along an interstate highway. The site of the sign is not a "business area." Accordingly, the sign is not eligible for a state sign permit.

2. Since the sign was in existence on the effective date of the sign control law, it can be maintained as a nonconforming sign pursuant to the provisions of Wis. Stat. § 84.30(5)(a) and Wis. Admin. Code § Trans 201.10(2). The Department has not carried its burden of proof to show that the subject sign has lost its nonconforming status because it has not remained substantially the same violation of Wis. Admin. Code § Trans 201.10(2)(e).

3. Pursuant to Wis. Stat. §§ 84.30(18) and 227.43(1)(bg) the Division of Hearings and Appeals has the authority to issue the following order.

Order

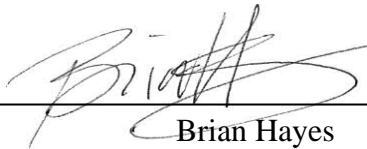
The Administrator orders:

For the reasons stated above, the sign removal order dated June 22, 2016, issued by the Wisconsin Department of Transportation to Lamar Company, LLC, and the Wixom Family Trust for a sign located along I-39 in Rock County is REVERSED.

Dated at Madison, Wisconsin on May 16, 2019.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, Fifth Floor
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____

A handwritten signature in black ink, appearing to read "Brian Hayes", is written over a horizontal line.

Brian Hayes
Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, Fifth Floor
Madison, Wisconsin 53705-5400

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.